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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL  
AND THE EUROPEAN PARLIAMENT

**FOLLOW-UP TO THE CONSULTATION PROCESS RELATING TO THE  
GREEN PAPER ON "PLURALISM AND MEDIA CONCENTRATION  
IN THE INTERNAL MARKET - AN ASSESSMENT OF THE NEED  
FOR COMMUNITY ACTION"**

**SUMMARY**

**Introduction**

**I. The consultation process**

**A. Consultation method**

**B. Assessment of the consultations**

**II. Analysis of the consultations**

**A. Outline of positions**

**B. Analysis of the answers to the questionnaires**

**C. Observations on the comments**

**III. Analysis of the options following the first round of consultation**

**A. Commission position on the options**

**B. Conclusions**

**C. Timetable**

CONTENTS

SUMMARY ..... 2

RESUMÉ ..... 4

INTRODUCTION ..... 7

I. THE CONSULTATION PROCESS ..... 9

    A. CONSULTATION METHOD ..... 10

        1. EUROPEAN PARLIAMENT, ECONOMIC AND SOCIAL COMMITTEE AND MEMBER STATES ..... 10

        2. INTERESTS CONCERNED ..... 10

    B. ASSESSMENT OF THE CONSULTATIONS ..... 11

        1. QUANTITATIVE ASSESSMENT ..... 11

        2. QUALITATIVE ASSESSMENT ..... 11

II. ANALYSIS OF THE CONSULTATIONS ..... 12

    A. OUTLINE OF POSITIONS ..... 12

        1. PARLIAMENT, THE ECONOMIC AND SOCIAL COMMITTEE AND THE MEMBER STATES ..... 12

        2. THE INTERESTS CONCERNED ..... 13

    B. ANALYSIS OF THE ANSWERS TO THE QUESTIONNAIRES ..... 15

        1. ANSWERS RELATING TO THE NEED FOR ACTION ..... 15

        2. ANSWERS RELATING TO THE CONTENT OF ANY ACTION ..... 21

        3. ANSWERS RELATING TO THE NEW TECHNOLOGIES ..... 23

        4. ANSWERS RELATING TO THE DEVELOPMENT OF NATIONAL RULES ..... 23

    C. OBSERVATIONS ON THE COMMENTS ..... 24

        1. THE SCOPE OF ANY ACTION ..... 24

        2. IMPLEMENTATION OF THE INTERNAL MARKET AND THE SAFEGUARDING OF PLURALISM ..... 27

        3. "LIBERALIZATION" EFFECT OF RULES ON PLURALISM ..... 27

III. ANALYSIS OF THE OPTIONS FOLLOWING THE FIRST ROUND OF CONSULTATION ..... 28

    A. COMMISSION POSITION ON THE OPTIONS ..... 28

        1. OPTION I (NO ACTION BY THE COMMUNITY) ..... 28

        2. OPTION II (RECOMMENDATION CONCERNING TRANSPARENCY) ..... 31

        3. OPTION III (HARMONIZATION OF NATIONAL RULES ON MEDIA OWNERSHIP) ..... 32

    B. CONCLUSIONS ..... 40

        1. THE SCOPE OF THE DEBATE ..... 40

        2. A MORE DETAILED EXAMINATION OF CERTAIN QUESTIONS RELATING TO THE CONTENT OF AN INITIATIVE ..... 41

        3. DEVELOPMENT OF THE NETWORK OF INTERESTS CONCERNED IN MEDIA OWNERSHIP ..... 43

    C. TIMETABLE ..... 44

**Annexes**

- List of non-confidential written comments
- List of European organizations invited to the hearing on 26 and 27 April 1993
- Summary of the Green Paper
- European Parliament resolution of 20 January 1994
- Economic and Social Committee opinion of 22 September 1993
- Information sheet on the disparities between national rules on media ownership

## RESUMÉ

1. At the request of the European Parliament and some of the interests concerned, in January 1993 the Commission asked all interested parties to participate in a wide-ranging consultation process on the basis of the Green Paper on "Pluralism and media concentration in the Internal Market - an assessment of the need for Community action". Now, more than a year later, the time has come to engage in a preliminary stock-taking exercise. This is happening at a turning point in the history of the media sector in Europe and will contribute towards implementation of the Commission's policy of promoting the information society, for which the associated imperatives were set out in the White Paper on Growth, competitiveness and employment. In this respect the present communication is an initial response to the report by the High Level Group ("Bangemann Group") set up by the European Council to put forward proposals on the information society. That report highlights among other things the detrimental effects on the Internal Market of the disparities between national rules on media ownership.
2. The purpose of the consultations on the Green Paper was to provide the Commission with the information it needs if it is to adopt a position on the sensitive issue of the need for Community rules on media ownership. The Green Paper had identified a number of obstacles to the proper functioning of the Internal Market caused by disparities between national rules on ownership of the media (television, radio and the press). The purpose of these national rules is to maintain pluralism by limiting access to media ownership by a single person, in particular by preventing cumulative control of, or holdings in, several media companies at once. The Green Paper showed that these disparities bring with them the risk of restrictions on the free movement of media services between Member States and on the freedom of establishment of media companies, considerable legal uncertainty, and restrictions - or distortions of competition. It concluded by proposing three options, although the Commission did not express any preference for any one of them at that stage. Option I consists in taking no action at Union level; Option II is a recommendation aimed at facilitating the exchange of information between Member States in the interests of transparency of media ownership; and Option III consists in harmonizing national restrictions on media ownership.
3. During the consultation process, which lasted over a year, opinions were received from the European Parliament and the Economic and Social Committee, both of which came out in favour of Option III. The Member States were consulted and they stressed the lack of any difficulties which might have justified Option II.

4. The consultations afforded the opportunity above all of gathering comments from the interests concerned, including both individual operators and the associations representing them at European level. The consultations developed a momentum of their own: the rate at which people made contact or sent in written comments remained steady and positions evolved over time. The replies to a complementary questionnaire sent out last summer revealed a change in the attitude of the interests concerned. Opinions may still be divided, but a majority of operators are now against the status quo (Option I) and in favour of a change in the existing regulatory framework governing media ownership. Positions are, on the other hand, even more divergent or less explicit on the question of the level (European or national) at which such a change should occur.

5. This general situation seems to be due to a number of factors:

Among the obstacles to the Internal Market identified in the Green Paper, the consultations revealed, more particularly, that the lack of legal certainty stemming from the current regulatory patchwork was a disincentive to investing in European media. This limits the opportunities for media companies to make the most of the growth potential of the Internal Market, and hence to play a more active part in promoting pluralism.

The new political and economic environment of the "information society", the importance of which was stressed in the Commission's White Paper on Growth, competitiveness and employment, has added a further dimension to the drawbacks caused by the lack, at Union level, of a common set of rules on media ownership. Globalization of the media industry and the new information technologies require that maximum use be made of the freedoms of the Internal Market in order to facilitate the transformation of this sector into a European industry which is both competitive and modern and which can perform to the full its essential role in the working of our democracies. This is why the introduction of a regulatory framework geared to the information society is one of the priority objectives of the White Paper, and why the High Level Group's report stresses the importance of a European approach to ending the patchwork of national rules on media ownership.

In order to adapt to this new environment, national laws on media ownership will evolve, and indeed are already evolving, in some Member States. Globalization and the development of the new information technologies are revealing a number of shortcomings in national laws on media ownership and necessitate their amendment. The prospect of such national legislative activity, uncoordinated at Union level, is likely to accentuate the damaging effects on the Internal Market of the disparities between national rules, foremost among which is fragmentation of the market.

6. Now that the European media industry is at a watershed, and in view of the importance which the Commission, like Parliament, attaches to the maintenance of pluralism, a Community initiative on media ownership might prove to be necessary. If this were to be the case, such an initiative should enable the internal media market to function, and in particular should facilitate the exercise of freedom of establishment for media companies and the free movement of media services in the Union, and at the same time maintain pluralism in the face of certain concentrations. It would provide both a maximum of legal certainty for investments in the media sector and a safety net preventing concentrations which represent a threat to pluralism and which cannot be dealt with under conventional competition-law rules.
  
7. The Commission will launch a second round of consultation with all the parties concerned having the dual objective of:
  - . rejecting or confirming the need for a Community initiative;
  - . in the event that such an initiative would prove necessary, define its limits

## INTRODUCTION

At the request of the European Parliament<sup>1</sup> and some of the interests concerned, in January 1993 the Commission launched a wide-ranging consultation process on the basis of the Green Paper on "Pluralism and media concentration in the Internal Market - an assessment of the need for Community action"<sup>2</sup>.

By adopting the Green Paper, the Commission sought, at the same time as providing a basis for discussion, to stress the importance which it attaches to preserving pluralism in the frontier-free area which is the Internal Market. The freedoms of the Internal Market cannot be put into practice at the expense of pluralism; on the contrary, their implementation helps to strengthen that market through the opportunities which it gives both citizens and the media.

The purpose of the Green Paper was to assess the need for action at Community level in the light of the disparities between national rules on media ownership. Since the middle of the 1980s all the Member States have introduced rules on media ownership. The purpose of these is to limit operators' freedom in order to and preserve pluralism. Four types of provision can be distinguished:

- Limits on monomedia concentration. These prevent the same person (natural or legal) from controlling or having an interest in several media of the same type at once, e.g. a ban on having more than "x" television stations or more than "x%" of the capital of a second station, if the operator already controls a TV station;
- Limits on multimedia concentration. These prevent a single person from controlling (or having an interest in) several media of different types, e.g. a newspaper company cannot control a television station, or a television station cannot control a radio station;
- Limits on shareholdings in a radio or television company which apply irrespective of *how many other media* are controlled, e.g. in some Member States it is impossible, even for a person who does not own any other media, to hold more than 25% of a television station;
- Limits concerning "disqualified persons". These prohibit certain types of operator or body from holding a radio or television licence or authorization, e.g. some Member States lay down that public bodies, local authorities, religious or political organizations and advertising agencies are "disqualified persons".

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<sup>1</sup> Resolution of 15 February 1990 on media takeovers and mergers, OJ No C 68, 19.3.90, pp. 137-8. Resolution of 16 September 1992 on media concentration and diversity of opinions, OJ No C 284, 2.11.92, p. 44.  
<sup>2</sup> COM(92)480 final, 23 December 1992.

Having emphasized that these rules vary widely between Member States (see Annex 7) and having analysed the impact of this diversity on the Community, the Green Paper summed up the analysis of the question of the need for action as follows:<sup>3</sup>

*"In the light of the objectives of the Community and of the analysis carried out here the need for possible Community action can be described as follows:*

- 1. The objective of ensuring pluralism, as it is understood and pursued by the Member States, does not as such create a need for Community intervention. The operation of the Community is not in itself a threat to pluralism; quite the reverse, it may have a positive effect on two factors which determine the level of pluralism: the number of broadcasters and newspapers and the diversity of their controllers. Member States have the legal capacity to safeguard pluralism, particularly where there is real circumvention. The only possible sources of difficulty are tension between national authorities regarding the definition of circumvention and questions regarding the transparency of media ownership and control.*
- 2. Among the methods used by Member States to safeguard pluralism, the disparity between the anti-concentration rules specific to the media constitutes an obstacle to the functioning of the single media market:  
it may result in restriction of the free movement of services where there is circumvention  
it may result in restrictions on freedom of establishment  
it may produce restrictions on competition  
it may distort competition  
it may cause legal uncertainty regarding the question of circumvention  
it limits access to media activity.  
Any need for action on the part of the Community, then, has more to do with ensuring that the Internal Market functions properly than with maintaining pluralism as such.*
- 3. For the present the obstacles are for the most part potential obstacles, because the relevant laws are recent and the strategies adopted by operators are often still national.*
- 4. Potential obstacles can be seen mainly in broadcasting, and particularly television broadcasting, which has the highest measure of regulation. The press is affected essentially by multimedia ownership rules rather than monomedia rules.*
- 5. The restrictions on media ownership which underlie the obstacles identified are not incompatible with Community law."*

The Green Paper concluded by proposing three options, without the Commission expressing a preference for any one of them at that stage. Option I consists in taking no action at Union level; Option II is a recommendation aimed at facilitating the exchange

of information between Member States to promote transparency of media ownership; and Option III consists in harmonizing national restrictions on media ownership.

Both the method and the scale of the consultations were justified in view of the importance the Commission attaches to the question of maintaining pluralism in the media and the complex and sensitive nature of the issue. Equally, in the context of the implementation of the principle of subsidiarity, a thorough approach was required to allow the need for action and the added value of action at Union level to be accurately identified.

The specific consultations on the Green Paper have been enriched by the work and the report of the High Level Group of prominent persons representing the interests concerned ("Bangemann Group"), set up by the European Council to put forward proposals on the "information society". The rapid changes in the technological and economic environment of all the media sectors inevitably throw up new topics for discussion during the consultations. It is generally accepted that digital technology is capable of transforming all media sectors by changing the economics of communication, the patterns of interdependence between sectors and the relations between the supplier of the service and the consumer.

The results of the consultation process and consideration of the principle of subsidiarity, notably the reality of obstacles to the freedoms of the Internal Market and the new dangers of fragmentation of the Internal Market created by the new rules currently being decided separately in several Member States, lead the Commission to the conclusion that an initiative at Community level might prove to be necessary. The Commission believes that it is therefore advisable to continue the consultation process. This should, in addition to enriching the information already gathered by the Commission, permit the latter to reject or confirm the need for an initiative and, in the latter case, allow it to have at its disposal all the key factors essential for the determination of its content. This content should be balanced and address the fundamental challenges to society posed by the safeguarding of media pluralism.

In the interests of transparency and in view of the wealth of information gathered in the course of the consultation process, the Commission wished to submit in this communication an interim report informing Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of the analysis it has made of the first round of consultation and of the follow-up it proposes.

## **I. THE CONSULTATION PROCESS**

In launching the consultations, the Commission had in mind not just a formal consultation of interested parties but to launch a genuine process with an in-built momentum featuring a frank and open dialogue with operators. This process has led to the creation of a kind of network of persons and operators interested in the question of pluralism and media ownership.

**A. Consultation method**

**1. EUROPEAN PARLIAMENT, ECONOMIC AND SOCIAL COMMITTEE AND MEMBER STATES**

As soon as it was adopted, the Green Paper was transmitted to Parliament and the Council. The Commission also asked the Economic and Social Committee to deliver an opinion on it. The consultations took place above all with the business circles concerned, the aim being to assess the impact on the Internal Market of the disparities between national rules on media ownership. Over and above the transmission of the Green Paper to the Council and the Member States' participation in the hearing attended by the interested business circles, the Commission wished to deepen the consultation with the Member States through a questionnaire on the transparency of media ownership. Only the national authorities were capable of furnishing the Commission with information on obstacles to the exchange of information between Member States relating to media ownership.

The Green Paper formed the subject-matter of an exchange of views at a ministerial seminar in Mons on 5 October 1993, in the course of which the Ministers for Cultural Affairs underscored the need to raise awareness among national business circles about the consultations under way.

**2. INTERESTS CONCERNED**

A *twin-track consultation process* was used, consisting of consulting on the one hand the federations and associations representing industry interests at European level, and on the other individual operators and all other interested parties. This twin-track approach made it possible to obtain both the common positions of European associations and federations and individual factual contributions on the specific problems encountered by the interests concerned.

A *hearing* attended by European associations and federations was held on 26 and 27 April 1993 (list of participants attached). Only European organizations were invited owing to space constraints but the positions of other interested parties were in any event taken fully into account.

A *complementary questionnaire* was sent to all interested parties on 28 July 1993 following receipt of the preliminary reactions to, and comments on, the Green Paper. The purpose of this questionnaire was to obtain more information on four specific points: the impact of the new technologies, the potential development of national rules, the real-audience criterion and the control criterion.

In addition, *numerous contacts and informal bilateral meetings* took place between the relevant Commission department and the interests concerned. Participation in conferences and symposia helped increase the latter group's awareness of the need to take part in the consultations.

*In the interests of transparency*, the written contributions received were gathered together, except where the originator withheld permission, in five volumes which were distributed among those who so requested. These can be obtained by sending a written request to the following address:

European Commission, DG XV/E-5, C 107 8/59, 200 rue de la Loi, B-1049 Brussels;  
fax: 32-2-296 17 36.

**B. Assessment of the consultations**

**1. QUANTITATIVE ASSESSMENT**

*Numbers.* Altogether, more than 70 sets of written comments on the Green Paper and the complementary questionnaire were received by the Commission. Of these, 25 emanated from European federations or associations and the remainder came either from individual operators or from national federations or private individuals.

*Geographical origin.* Among the comments from interested parties other than European industry federations, those originating in the United Kingdom, Germany and Italy were the most numerous. Some positions were received from the Netherlands, France and Greece. No contributions were received from operators in other Member States.

*Origin by sector.* About twenty written contributions emanated more particularly from the television sector, while some fifteen positions came from the press, six from the radio sector, eight from multimedia operators, and five from journalists' federations and employees in the media sector.

**2. QUALITATIVE ASSESSMENT**

**(a) Momentum of the consultations**

The Commission was at pains to ensure that the consultations built up and maintained a momentum, which meant doing more than just waiting for written comments to come in. In the event, the regular contacts between the department concerned and interested parties and the dispatch of a complementary questionnaire helped create a dynamic which worked well. The complementary questionnaire thus made it possible to gather positions from operators who had not yet submitted comments on the Green Paper as well as from those who had. There were more new participants in the consultation process than participants who had ceased to play the consultation game.

**(b) Representativeness of the positions**

With regard to the European industry federations, it is difficult to determine precisely whether the positions accurately reflect the views of all the operators involved. However, with regard to individual operators, the Commission notes with regret that the bulk of the positions come from just three Member States, namely Germany, Italy and the

United Kingdom. Operators from the other Member States were disinclined to submit formal contributions, despite the fact that some of them had established formal contact with the Commission's departments.

**(c) Quality of the information**

The contributions from parties other than European associations or federations provided a large number of specific and useful items of information. The positions of the European associations and federations are more a reflection of compromises which sometimes contain ambiguities or inconsistencies inherent in a collective decision-making process. The radio associations played an active part in the consultations and provided an insight into a modern and dynamic medium.

It is important to note that many of the European federations' positions were presented at the spring '93 hearing in a provisional form and that, in most cases, these positions have been neither confirmed nor called into question by definitive positions. The associations and federations have preferred instead to reply subsequently to the complementary questionnaire and to modify their positions through these replies without formally confirming their initial comments or otherwise.

Lastly, the low participation rate among consumer associations is to be regretted in view of the essential role they have to play in this sphere.

**II. ANALYSIS OF THE CONSULTATIONS**

The results of the consultations cannot be presented in a simplified and schematic form owing to the many nuances, hesitations or distinctions which characterise the contributions and positions of the interests concerned. Moreover, a number of misapprehensions need to be cleared up by the Commission.

**A. Outline of positions**

**1. PARLIAMENT, THE ECONOMIC AND SOCIAL COMMITTEE AND THE MEMBER STATES**

**(a) Parliament**

Parliament adopted an opinion on the Green Paper on 20 January 1994.<sup>4</sup> It comes out in favour of **Option III subsection c** ( creation of an independent committee). It accordingly calls on the Commission to draw up a proposal for a directive "firstly harmonizing

<sup>4</sup>

OJ C 44, 14.2.1994, p. 177.

national restrictions on media concentration and secondly enabling the Community to intervene in the event of concentration which endangers pluralism on a European scale" (§ 1). It asks that an independent committee, or "European Media Council", be set up. It provides some details as to the content of the proposal for such a directive, and calls on the Commission to propose a directive on access to information held by national and Community authorities and a directive safeguarding the independence of information, and to put forward proposals concerning a European media code of conduct to maintain professional ethics.

**(b) The Economic and Social Committee**

The ESC adopted an opinion on the Green Paper on 22 September 1993.<sup>5</sup> It came out in favour of **Option III**. Like Parliament, it calls for the drafting of a proposal for a directive and considers sub-option C (establishment of an independent committee) to be "both reasonable and effective" (§ 4.7).

**(c) The Member States**

The specific questionnaire sent to the Member States in July 1993 has shown that **there is no need that justifies Option II** because at the present time there are no real difficulties in exchanging information relating to the transparency of media ownership. As regards the choice between Options I and III, Member States took a waiting position, not wanting, so it seems, to take up a position at this stage before knowing the results of the consultations with the interests concerned. One Member State wished to state its position on the options in the Green Paper in writing.

**2. THE INTERESTS CONCERNED**

Generally speaking the industry's position can be stated as follows: **the current national rules on media ownership must change, in particular so as to cope with globalization and the impact of the new technologies. On the other hand, the question of the level - national or European - at which the change must occur is the subject of vague or divided positions.** This is due to the fact that those in the industry hesitate to take a position on this question without knowing the exact content of the rules. Some of them had the impression that the Commission was asking them to sign a "blank cheque". This position emerged recently when the complementary questionnaire was being answered.

In view of the complexity of the posed questions, the diversity of the interests concerned and subtle variations between the comments, it is not possible to distinguish between and regroup the various positions according to the names of the originators. Dividing

<sup>5</sup>

OJ C 304, 10.11.1993, p. 17.

lines have, however, shown up clearly according to the type of operator concerned. Five dividing lines are clearly visible in the industry, depending on the operators concerned:

**(a) According to the scope of the operators' strategy: European strategy/national strategy**

Those operators who have a strategy of establishment (acquisition of holdings in, or control of, media companies) in the different Member States are the first to be interested in a common rule of the game in the Community which is both fixed and stable and which offers the legal essential to investment in this sector, where the risks and cost of access are already particularly high. On the other hand, those operators who have a strategy of establishment in their national market are less interested in a common rule except if they are adversely affected by distortions of competition (see below).

**(b) According to the operators' activities: monomedia press activities/multimedia activities**

Some operators who have a monomedia press strategy can see no point in Community action in so far as they are not victims of the disparities between laws on media ownership. Only France and Italy have specific rules limiting monomedia concentration by means of "mechanical" thresholds. Because such rules do not exist in the other Member States, the effects of the disparities are less important than in the case of multimedia activities or monomedia broadcasting concentration. By contrast, multimedia operators (or monomedia TV and radio operators) are more favourably disposed towards Community intervention because they may come up against the effects of the disparities between the rules that have been introduced in all Member States.

**(c) According to the operators' origin: open market/closed market**

Operators carrying on activities in a country where the rules on ownership are liberal are sometimes worried that investors might concentrate on their market rather than go to other countries where access to ownership is less liberal. The best-known example, which predates the Green Paper, is that of the British television company ITV, which voiced these fears in view of the fact that in the United Kingdom a single operator may have 100% of the capital of an ITV station whereas in other Member States holdings are limited to a maximum of 25% (as in Greece or Spain) or to less than 50% (as in Germany and, since recently, in France).

**(d) According to the operators' experience: new entrants/established operators**

New entrants have an obvious interest compared with established operators. The latter have had to find their feet in a recently enacted national regulatory environment and are therefore sometimes unfavourably disposed towards any action which might destabilise it. By contrast, new entrants who wish to invest in the media sector with an industrial

approach wish to have a legal framework which liberalizes market access and removes the legal uncertainty of the current regulatory patchwork. Thus, certain established media operators have expressed concern at the entry into the media market of the large telecommunications companies.

**(e) According to the duration of a strategy: short-term strategy/long-term strategy**

The consultations also revealed a difference between companies with a long-term strategy and those with only a short-term strategy or no strategy at all. The latter are sometimes tempted to prefer the status quo to a Community initiative. By contrast, operators who have a long-term strategy are on the whole in favour of such an initiative inasmuch as they view the Internal Market more as an opportunity than a threat.

**B. Analysis of the answers to the questionnaires**

**1. ANSWERS RELATING TO THE NEED FOR ACTION**

At issue here are the answers to questions 1 to 3 and 5 of the Green Paper questionnaire<sup>6</sup>.

**(a) Protection of pluralism**

*As regards the safeguarding of pluralism as such*, Parliament, the Economic and Social Committee, the journalists' federations and the trade unions said there was a risk that pluralism might be affected and that this justified action at European level. Parliament, in particular, in its resolution of 20 January 1994, considers "that national media legislation alone was no longer sufficient to safeguard diversity of opinion and pluralism in Europe" (recital A); that "media concentration and cross-ownership are increasing in the Community (and that) once established, such cross-ownership, where it reduces diversity of opinion, is difficult to reverse" (recital C) and, lastly, that "there is a need

<sup>6</sup> **QUESTION 1:** The Commission would welcome the views of interested parties regarding the need for action, and in particular on:

any cases where the Community dimension of media activity has meant that restrictions on media ownership imposed for the purpose of maintaining pluralism have become ineffective, for example because they are circumvented or because of transparency problems;

the existence of restrictions or restrictive effects other than those identified here;

practical instances where ownership restrictions have actually impeded the activity of economic operators in the sector;

the sectors and activities which are especially affected by restrictions on ownership (for example, is the press subject to restrictive effects not only in respect of multimedia aspects but also in respect of monomedia aspects?).

**QUESTION 2:** The Commission would welcome the views of interested parties on whether the needs identified are of sufficient importance, in the light of Community objectives, to require action in the media industry and, if so, when such action should be taken. **QUESTION 3:** The Commission would welcome the views of interested parties on the effectiveness, in the light of Community objectives, of action which would be taken solely at Member State level. **QUESTION 5:** The Commission would welcome the views of interested parties on the desirability of action to promote transparency which would be separate from a harmonization instrument.

to harmonize national legislation which imposes restrictions on the media in order firstly to prevent them being evaded and secondly to safeguard the operation of the Internal Market, thereby at the same time increasing the competitiveness of the European media" (recital E).

**(b) Transparency of media ownership**

Action relating to transparency separate from rules on media ownership (Option II) is rejected by Parliament and the ESC, which consider that both types of measure should be dealt with together. Opinions among the interests concerned are more divided: those who are hesitant about, or against, rules on media ownership tend to support action in relation to transparency, whereas those who are in favour of Option III are opposed to such action. An independent national supervisory authority came out in favour of Option II. The answers to the questionnaire sent to the Member States in July 1993 generally indicate that for the time being there are no obstacles to the exchange of information. Those who are in favour of Option II sometimes understood this option as covering all problems of transparency, including the quality and effectiveness of national rules, whereas in fact it concerned only the question of the exchange of information relating to transparency.<sup>7</sup>

**(c) Reality of the obstacles to the Internal Market identified in the Green Paper**

At the end of a legal analysis, the Green Paper specifies that the Member States may legitimately, in certain cases, take measures limiting the application of the principles of the Internal Market in order to preserve pluralism - an objective of public interest. Thus, a number of obstacles to the functioning of the Internal Market are identified: television channels' *freedom to retransmit* (Article 59) between Member States may be restricted in the event of a genuine circumvention of the legislation on media ownership, and media companies' *right of establishment* (Article 52) in the Member States may be restricted. In addition, it is possible for there to be *distorsions and restrictions of competition*; *legal uncertainty* may discourage investment and damage the competitiveness of media enterprises; lastly, in a general way, *access to media activities* may be limited. The consultation process, which lasted over a year, showed that the obstacles were real.

<sup>7</sup>

Part Four, Chapter 5, §II "If there were really a need with regard to transparency, this would be to make it easier for information to be gathered and exchanged between the authorities concerned by means of a legal obligation on media enterprises to disclose information (so that, where appropriate, controlling interests can be identified) and on the competent authorities to communicate information to other authorities. For this purpose a recommendation could be proposed or, if necessary, a legal instrument."

(i) *The disparity of the rules discourages direct investment in media enterprises and the exercise of the right of establishment*

The consultations demonstrated that the obstacles to the Internal Market show up in decisions not to make any direct investments, i.e. not to set up, or take a stake in, a media company. Setting up a media enterprise - be it a new company, a subsidiary, a restructuring operation, acquisition of control or a merger - is a project which takes time and carries risk since everything depends ultimately on an authorization being given by a national authority. Thus, the obstacle becomes tangible more as the result of a process that culminates in a decision not to invest in an establishment project than in the shape of a decision by a competent authority not to grant a licence, thereby giving rise to a formal dispute.

This observation is confirmed by two phenomena: first, the undercapitalization of media companies in certain Member States or the difficulties they have in raising capital (problems of finding new shareholders, or conflicts between shareholders) and, second, the recent investments by European operators in non-European markets (operators reported that since there was no genuine Internal Market for the media they preferred to invest on the American market or in the new markets of Asia). The economic analysis in the Green Paper, which drew on a study by a consultant, had already shown that direct investments between Member States in media companies are fairly limited, apart from in the magazine sector, which is in fact not covered by the rules on media ownership.

The disparities between national rules act as a deterrent for two reasons:

- Disparities give rise to legal uncertainty about the legitimacy of any national measure rejecting licence applications on account of shareholdings in or control of media in the other Member States. The legality for the purposes of Community law of such a measure, which has been foreseen under several national legislations, would have to be examined in the light of its proportionality to the objective pursued. The result of such a scrutiny is very risky and uncertain. The uncertainty is furthermore accentuated by the fact that the rules on media ownership sometimes vague which is the source of conflicts, as for instance those in Germany over the definition of controller (disputes between two Länder authorities) and in France (purchase of the newspaper *Dernières Nouvelles d'Alsace*). Legislative disparities and legal uncertainty mean that setting up a new media enterprise will entail search costs. This is not a negligible item, especially for small media ventures such as radio stations. Contacts with lawyers, e.g. at conferences and seminars on the Green Paper, confirm that operators commission research at substantial cost in addition to the usual market research.

- The disparities between national systems of law produces *restrictions of competition* and induce operators to engage in "forum shopping" - identifying investment prospects more in terms of the national legislative framework than in terms of market opportunities. Operators have stressed that this can lead to investment decisions which are inefficient or conclude not to invest at all. Some national markets are thus "protected" from new competitors, which facilitates mergers between operators already there. The argument that the latter are subject to the same restrictive rules as those who want to gain access to the market is not relevant, since the operators already there have the advantage of having had time to become established and to influence the legal framework ("fief" effect).

(ii) *Disparities create legal uncertainty about the free movement of broadcasts*

The Green Paper analysed the question of circumvention at length and concluded that the Member States could legitimately restrict the free movement of a channel which circumvents legislation on media ownership (by broadcasting, for instance, via satellite from another Member State) if the measure were proportionate to the objective of pluralism. Through this condition of proportionality, which requires an examination of each individual case, the Green Paper recognized the importance of the grey area of legal uncertainty which exists to distinguish genuine circumvention from the action of an operator who is only using the opportunities of the Internal Market.

The consultations showed that circumvention of rules in a way which threatened pluralism was regarded as a plausible scenario in particular by Parliament, even if for the moment there had been no clear instance of it. On the other hand, some operators seem preoccupied by the possibility that a Member State might invoke the circumvention argument in the case of activities which did not constitute one. In this respect, it should be noted that in the case of infringement proceedings the objective of pluralism has been used several times by the Member States to justify measures limiting the free movement of television broadcasts or the freedom of establishment. The national measures in question in these cases did not, however, involve rules on pluralism and media ownership. A fortiori, this means that the risk of the rules on media ownership being invoked by a Member State to challenge a broadcast from another Member State will increase as cross-border activities expand.

(iii) *Disparities expose operators to distortions of competition*

Already back in 1992, the UK television channel ITV formally drew the Commission's attention to the distorting effects of the disparities between the rules on media ownership.

Various operators reported that the difference between their national rules and those of the other Member States made it hard for them to compete against media enterprises from other Member States which had been able to grow under fewer constraints.

During the consultations, operators expressed fears about fragmented liberalization at Community level, i.e. only in their Member State. This could have the result of exposing them to competition from large groups from other Member States or non-member countries which were attracted by the national market thus liberalized. In this respect, media operators were worried about telecommunications operators, who were preparing, in the context of the information society, to enter the media market and who would be the first to be interested in liberalization by a Member State acting alone.

- (iv) *The opportunities afforded by the new technologies and the Internal Market cannot be fully used within the current legal framework*

This was the virtually unanimous conclusion of all operators: at a time when the new technologies (digital transmission, compression and convergence) make it possible and essential to cross national frontiers, the current legal framework is inappropriate. The rules were drawn up at a time when frequencies were scarce, whereas, from now on, digital technology will increase the technical capacity to create new channels (by a factor of between 6 and 10). The inappropriateness arises not only out of the nature of the national rules but also from the disparity in national approach, for the investment needed to implement these new technologies requires that markets be found at Community level. It is not enough therefore for one Member State alone to adapt its rules, because an operator established there would encounter obstacles when exporting the new media services to other Member States whose legislation on media ownership did not offer the same opportunities.

One of the strategies cited most by operators consists in broadcasting a bundle of specialized channels (made possible by digital compression) to a small target audience; to be profitable, this must have a cross-border dimension. While these clusters could be lawful in certain Member States, they would not be in others whose legislation restricts the number of channels. Legally, the outcome of any dispute that might arise is very uncertain, for an assessment would have to be made in each case of whether, given the principle of proportionality, a Member State can legitimately restrict such broadcasts. Another example of the uncertainty of the current legal framework which could cause problems for cross-border broadcasting lies in the definition of the televised media (are electronic newspapers covered by the current rules?) or in the application of ceilings to shareholdings in a television channel.

(v) *The new technologies and the legislative reactions to them will increase the significance of the obstacles to the Internal Market in the short term*

The consultations showed that as a result of the new technologies, operators are now thinking in terms of the new media and new European markets to make their exploitation profitable. In this respect, the obstacles to the Internal Market will have a quite different effect in the very short term:

- the expansion of cross-border media activities as a result of the new technologies increases the risk of conflicts or disputes arising out of the disparities between national rules;
- the obstacles to the Internal Market could become even more important since, faced with the new technologies, national rules are changing and may become even more disparate. In Germany, the competent authorities in the Länder have started work on the revision of the ownership rules in the "Rundfunkstaatsvertrag"; in Belgium, a debate has been launched on the impact of digital technology; in France, a new law has now liberalized the rules on the maximum shareholding in a television company, and a report by the Conseil Supérieur de l'Audiovisuel (CSA) proposes that the anti-concentration rules be amended; in Italy, there has been a public debate about media ownership for some years; in the Netherlands, a code of conduct has just been drawn up to limit monomedia concentration in the press; and in the United Kingdom a review of the rules on multimedia ownership has been launched with a view to their liberalization. With these developments in the national rules there is a real risk that national approaches will become even more disparate if there is no coordination at Community level. Such disparity is already apparent with regard to the general objective: in some Member States (e.g. the United Kingdom or France), the changes are intended to liberalize the current framework in order to face up to world competition, whereas in other Member States (Germany or the Netherlands) the debate focuses more on increasing the effectiveness of supervision. Another cause of this disparity is that the starting point for these changes varies considerably since current rules and national markets are already very dissimilar. Without a Community framework for these legislative developments, therefore, there is no chance that a natural alignment between national rules will occur;
- lastly, faced with the globalization of the media industry, European media companies will not be sufficiently competitive on the international scene if they cannot exploit the opportunities for development provided by the Internal Market.

(d) **The quality of national rules**

The *quality of national rules* on media ownership was often criticised, in particular to draw attention to the need to facilitate access by operators to media activities.

The radio sector, in particular, underscored this aspect in view of the difficulty of obtaining authorisations or licences. This question reveals the existence of pressure to bring about changes in national regulatory frameworks.

**(e) Competitiveness of the industry**

The *importance* of the objective of promoting the industry's competitiveness, in assessing the need for action, was stressed, in particular by publishers and multimedia operators, owing to the globalization of the media industry and the development of new technologies.

**2. ANSWERS RELATING TO THE CONTENT OF ANY ACTION**

At issue here are the answers to questions 4 and 6 of the Green Paper questionnaire and to questions C and D of the complementary questionnaire.<sup>8</sup> The question of the content of any action was both omnipresent in the positions voiced and paradoxically treated with little precision and substance in the contributions received. Many participants in the consultation process tended to link the question of the need for action to that of the content of such action, whereas they are two separate questions which can be answered separately.

The *setting-up of a European committee* was called for by Parliament and the ESC, but on the other hand is objected to by a majority of the business interests concerned.

*The question of the coverage of monomedia press concentration.* The consultations revealed, on the one hand, that operators in two countries (F, I) with an automatic

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**QUESTION 4:** The Commission would welcome the views of interested parties on the content of a possible harmonization instrument as envisaged above, and in particular on the two variants for its scope, on the use of the real audience as a basis for setting thresholds, on the demarcation of distribution areas, on any other possible references, and on ways of defining the concept of controller. **QUESTION 6:** The Commission would welcome the views of interested parties on the desirability of setting up a body with competence for media concentration. **QUESTION C1.** Given that a criterion of potential audience (like the population covered by a satellite footprint) would be too restrictive, what type of audience measurement might be utilised, in particular for multimedia and monomedia concentration of radio and television enterprises (for example, "audience share" for television, "daily reach" for radio, number of dailies sold for newspapers)? **Question C2.** With reference to criteria used in national arenas, namely the number of channels, will the audience criterion offer more opportunities to access the market, namely for thematic (i.e. special-interest) channels (by reason of their small audience)? **Question C3.** What might the necessary conditions be to make a system using thresholds based on audience levels workable (compatibility, comparability, equivalence, etc.)? Is it possible to have a single audience criterion applicable to multimedia or is it necessary to have several distinct criteria applicable to each medium or combinations of media? **Question C4.** Might it be deemed necessary to have complementary criteria such as, for example, that of language of the media, that of the type of radio station or TV channel concerned, that of the number of licences granted at the same time, etc.? **Question C5.** Should the fixing of thresholds leave a discretion to the Member States to set stricter limits for operators established on their territory? **Question D1.** Is it necessary to go further than existing company law to define media control in specific rules? **Question D2.** What comments can be made on the definitions used for media controllers in current national regulations? **Question D3.** What elements should a definition contain bearing in mind the objectives of effectiveness, adaptability to the Community framework, and compatibility with existing systems as well as the economic and technological effects that could result?

limit on monomedia press concentration wished to be no longer discriminated against compared with the other Member States which have no such limits and, on the other, that operators in the other Member States were opposed to the extension of this type of limit in their country.

The *audience criterion* envisaged in the Green Paper<sup>9</sup> was commented on several times in fairly general terms. Three points of view were expressed: it is a logical criterion but one which poses problems of feasibility; it is an inadequate criterion which needs to be accompanied by economic criteria (such as revenue); it is not a good criterion. The majority of comments fell into the first two categories. The question whether a single, integrated multimedia criterion can be used was answered in a variety of ways. It should be noted that the audience criterion gave rise to misunderstandings and that, in the intervening period between the answers to the Green Paper questionnaire and those to the complementary questionnaire, positions evolved, the criterion being viewed in a more favourable light. Some operators were under the mistaken impression that the criterion might penalise the growth of an existing television channel, whereas in fact it would be used only in the context of an application, to a national authority, for authorisation to set up a new channel or to take over (or acquire a shareholding in) an existing channel.

The *media controller criterion* also envisaged in the Green Paper<sup>10</sup> was the subject of very few specific comments. However, the majority of contributions stressed that it would be necessary to lay down specific rules which go further than existing company law in defining control.

The question of *persons ineligible for media ownership* (disqualified persons) was considered important by Parliament, which asks, in particular, that advertising agencies should not be allowed to run newspapers or radio or television companies and vice versa.

<sup>9</sup> The Green Paper envisages using the audience criterion for setting restriction thresholds limiting access to media ownership: in order to award a license to a new television channel ( or to authorise the acquisition of control of an existing television channel). The national controlling authorities should determine if the media audience already controlled by the applicant for a license does not exceed the threshold fixed by the directive, for the broadcasting zone of the new channel.

<sup>10</sup> It is a question of finding a definition that allows the person or operator controlling a media enterprise to be identified in order to apply the audience criterion limiting access to ownership.

### 3. ANSWERS RELATING TO THE NEW TECHNOLOGIES

At issue here are the answers to question A of the complementary questionnaire.<sup>11</sup>

All the answers stress the sizeable impact of the new technologies, in particular digitalization, compression and convergence, which will make it possible to increase the number of television channels, appreciably modify commercial strategies and increase globalization. The positions stress that the current rules on media ownership are unsuitable owing, especially, to the methods they use, in particular the criterion of the number of channels controlled by a single operator, or the definitions of broadcasting (does it cover electronic publishing?). The contributions also stress the importance of new technologies for the publishing sector. Some operators in the radio sector raised the problem of access to technologies, in particular DAB (Digital Audio Broadcasting), and stressed the risk of further concentration which they involve. Other positions, on the other hand, point to the need to increase the flexibility of the anti-concentration thresholds to the extent necessary for the development of the new broadcasting technologies. Some questions deserve to be examined more thoroughly, such as those related to the economic ties of the media operator both upstream and downstream and those concerning the pattern of vertical integration.

### 4. ANSWERS RELATING TO THE DEVELOPMENT OF NATIONAL RULES

At issue here are the answers to question B of the complementary questionnaire.<sup>12</sup> In general, the answers mentioned the existence of regulatory or pre-regulatory

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<sup>11</sup> **Question A1:** Identify the new technologies or those under expansion which will affect the market (distinguishing namely between those which, from the point of view of the consumer, will replace existing technology and those which will be of a more complementary nature, giving details of the expected time scale for implementation of these technologies). **Question A2:** What economic impacts will be foreseeable at the Community level, in particular on the market structure and on the strategy of operators within the internal market? This evaluation will not have to be all-encompassing but should be carried out on a technology-by-technology basis. It is important to give precise information about the access costs to these technologies, in particular for the consumer and the operators. **Question A3:** What impacts will be foreseeable on the national statutory arena in regard to media ownership? Does current national legislation covering media ownership permit, or, on the contrary, limit, the development of these new technologies (explain the effect of any limitations)? **Question A4:** To what degree could the new technologies develop conditions for the granting of authorizations or licences applicable to television or radio operators? In particular, which conditions, besides those relating to pluralism, could be envisaged?

<sup>12</sup> **Question B1:** Are you aware of any proposals for new anti-concentration rules, in the Member States, specific to the media? What is their origin and objective? **Question B2:** Would you welcome a change in the applicable regulatory framework? **Question B3:** What factors could change the national regulatory framework in the future (new broadcaster authorisations, case law developments, political debates, ineffectiveness of national rules, over-stringent rules, etc.)? **Question B4:** How long did it take to draw up the current regulations and were you involved in the process? **Question B5:** Could these possible changes accentuate or attenuate the regulatory disparity between the Member States of the Community?

activity in several Member States, and a number of positions stressed the risks of an increase in the disparities between national rules.

**C. Observations on the comments**

The consultations revealed a number of misapprehensions which need to be cleared up.

1. THE SCOPE OF ANY ACTION

(a) *Questions relating to access to information and the exercise of journalistic activities*

In its position Parliament asked the Commission to propose certain other measures apart from those on media concentration, namely a directive on access to information held by national and Community authorities, a directive safeguarding editorial independence, and a code of conduct on professional ethics. The Commission would point out in this connection that the questions dealt with in the Green Paper were defined in the light of the Community's competences and the principle of subsidiarity.

As regards the request for a *directive on access to information held by national and Community authorities*, the Commission acknowledges that the questions of transparency and access to information are important. It was with this in mind that it presented two communications to the Council, Parliament and the Economic and Social Committee, one on transparency in the Community,<sup>13</sup> and the other on public access to the institutions' documents.<sup>14</sup> These two communications underline the Commission's concern to implement a policy of transparency at the level of the Union's institutions, especially by means of an interinstitutional agreement. They do not, however, tackle the issue of access to information in the Member States in so far as such matters are already dealt with at national level in accordance with approaches specific to each Member State. In this context, regulatory intervention at Union level is not justified in the light of the Internal Market as the disparities between national rules on these questions do not create obstacles which ought to be removed by harmonization.

As regards the *media code of conduct on professional ethics* and the *framework directive safeguarding journalistic and editorial independence*, in view of the Community's competences and the principle of subsidiarity these matters cannot be dealt with at Community level but are a matter for the Member States. In the first place, such questions are not always dealt with by regulatory means, being instead governed by

<sup>13</sup>

COM(93) 258 final, 2 June 1993.

<sup>14</sup>

COM(93) 191 final, 5 May 1993.

codes of ethics which do not concern the legislator, and in the second place, where statutory rules do exist, the differences between Member States do not seem to cause any problems for the functioning of the Internal Market such as would justify their harmonization.

**(b) Question relating to internal pluralism**

The question of internal pluralism has given rise to a number of misunderstandings which have led to several requests being made that public channels be excluded from the scope of a possible directive on media ownership. This is a sensitive issue and the Commission is of the opinion that the specific nature of public channels must be taken fully into account in determining the content of any rules. However, any automatic or a priori derogation would require an in-depth analysis along the following lines:

First of all, a partial harmonization, i.e. a harmonization which would not cover all cases of concentration, might not remove the obstacles to the Internal Market created by the disparities between national rules.

Secondly, if the content of the directive prevents media concentrations above a certain level, all cases of concentration must be covered, including those involving public channels, in which case their public service missions should however be taken into account.

Thirdly, public channels sometimes behave like private operators when implementing a diversification strategy which could lead to, for example, the creation of new channels which are not subject to the same public channel internal pluralism obligations.

Fourthly, the interests at stake must not be confused: harmonization of regulations on media ownership would not in any way call into question the specific characteristics of public broadcasters, including their public service and internal pluralism obligations.

Lastly, there is no substitutability between internal pluralism measures and external pluralism measures: although the general objective is the same, namely to ensure pluralism, the specific objective pursued by these two types of measure in attaining the general objective is different: internal pluralism measures seek to ensure diversity of opinion within a channel's programmes; external pluralism measures seek to ensure diversity of opinion, not within a channel's programmes, but through the independence and autonomy of the different media offered to the public. It is thus not possible to offset any non-application of external pluralism measures by the application of internal pluralism measures.

